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FILE: B-184751

DATE: June 24, 1976

MATTER OF: Fechheimer Brothers, Inc.

98400

DIGEST:

1. Once oral or written discussions are held with one offeror within competitive range, discussions must be conducted with all offerors in that range. However, contracting officer's request for second sample from one offeror and for certification that sample meets specification does not constitute discussions with the offeror since second sample was not accepted as substitute for original sample and offeror was obligated to meet specifications under terms of its offer even in absence of certification.
2. Specification may not be regarded as too indefinite to permit formal advertising merely because agency has no experience with the specification. Rather, specification itself must be evaluated to determine if it is sufficiently definite to permit formal advertising.

Fechheimer Brothers, Inc. (Fechheimer) has protested the award of a requirements contract for uniforms by the United States Secret Service to Gerber Manufacturing Company, Inc. (Gerber) under request for proposals (RFP) No. USSS 75-R-75, of a requirements contract for uniforms. Fechheimer claims that Gerber was given an opportunity to revise its proposal but that no such opportunity was provided to Fechheimer.

The RFP requested offerors to submit both a sample of the cloth to be furnished under the contract and a certification that the sample met the specifications. Of the four offerors on Group I uniform items (blouses, trousers, skirts, reefers), none furnished the certification and only Gerber, the low offeror for Group I uniform items, and Fechheimer, the second low offeror, furnished the required sample. After submission of proposals, the contracting officer informed Gerber that he could not determine if the Gerber sample met the specification requirement that cloth be stock dyed rather than piece dyed. He also called Gerber's attention to the certification requirement. Gerber subsequently furnished both another cloth sample and a certification. Award was then made to Gerber.

Fechheimer asserts (1) that Gerber's original sample did not meet the specifications and (2) that since after offers were received the Government allowed Gerber to submit a new sample and a written certification, the Government should have opened negotiations with all offerors within a competitive range.

The contracting officer does not agree that Gerber's initial sample did not meet the specifications, that Gerber was provided with an opportunity to revise its proposal or that negotiations should have been conducted with offerors. According to the contracting officer, the second Gerber sample was neither requested by the Government nor offered by Gerber as a substitute for its original sample. Rather, the contracting officer reports, after he made his concern about the stock dye requirement known to Gerber, that firm submitted a sample that was known to be stock dyed so that the Government could compare the two samples and confirm that the first sample was stock dyed. Thus, in the contracting officer's view, Gerber did not revise its proposal through the submission of a second sample, but merely clarified it. With regard to the certification, the contracting officer states that its absence "was considered * * * as a minor informality" and "was not a predominant factor in award of the contract * * *."

Federal Procurement Regulations § 1-3.805-1(a) (1964 ed.) states in part:

"After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submitted proposals within a competitive range, price and other factors considered, except * * *

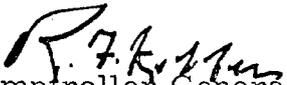
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"(5) Procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate pair cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a final reasonable price * * *."

This provision requires that discussions be conducted with all offerors in a competitive range unless certain specified conditions are present. However, even if those conditions are present, once discussions are held with one offeror, then discussions must be conducted with all offerors in the competitive range. 51 Comp. Gen. 479 (1972); 50 id. 202 (1970). We have held that the question of what constitutes discussions depends on "whether an offeror has been afforded an opportunity to revise or modify its proposal * * *." 51 Comp. Gen. 479, 481, *supra*. Thus, we have found that a requested "clarification" which resulted in a price reduction constituted discussions, *see* 48 Comp. Gen. 663 (1969), while an explanation by an offeror of the basis for its price reductions without an opportunity to change its proposal did not constitute discussions. B-170989, B-170990, November 17, 1971.

Here, we do not believe that discussions were held with Gerber. As the contracting officer has explained, Gerber's second cloth sample did not represent a revision to Gerber's proposal, since the sample was neither offered nor accepted as a substitute for the original sample. With regard to the certification, the contracting officer seems to have conflicting positions. On the one hand, he refers to the certification's omission from the Gerber proposal as a "minor informality" on the other hand, he suggests that the certification was material when he also states that had Gerber not furnished the certification upon request, he would have "made the same request of the second low offeror (Fechheimer Brothers, Inc.)." We understand that the contracting officer sought the certification because the Secret Service believed that it could not determine solely from examining the sample that the sample met the specifications. However, we believe that by signing and submitting a proposal, an offeror committed itself under this solicitation to comply with the specifications, and that the certification did not add to the legal obligations of the offeror that would result upon acceptance of its proposal. *See, e.g.,* B-174216, December 27, 1971. Accordingly, we believe that the Gerber's submission of the certification did not result in any change in its contract obligations and that therefore the request for and receipt of that certification did not constitute discussions. *See Ensign Bickford Company, B-180844, August 14, 1974, 74-2 CPD 97.* Accordingly, the contracting officer was not required to conduct discussions with Fechheimer.

We are concerned, however, with the use of negotiations in this case. The Determination and Findings which supports the resort to negotiation states that it was impracticable to obtain competition by formal advertising "because the purchase description at this time cannot be written in sufficient detail to adequately describe the items required. The style and construction must be of such precision that it cannot be sufficiently described at this time." We note, however, that the RFP set forth specifications in considerable detail, and that the Secret Service apparently intended to rely on an examination of samples submitted rather than on negotiation procedures to determine the acceptability of what was being offered. We also understand that the Secret Service actually views the specifications as indefinite because they are being utilized for the first time and there is no prior procurement experience with them to verify that the specifications are adequate. However, "it is the specification itself, without regard to an agency's procurement experience under it, that must be evaluated to determine if it is sufficiently definite to permit formal advertising." ALS Electronics Corporation, B-181731, October 18, 1974, 74-2 CPD 214. We are bringing this matter to the attention of the Secretary of the Treasury.


Deputy Comptroller General
of the United States